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IN THE UNITED STATES DISTRICT COURT
FOR THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

UNITED STATES OF AMERICA,

Plaintiff,

vs.

COMMONWEALTH UTILITIES
CORPORATION and the
COMMONWEALTH of the
NORTHERN MARIANA ISLANDS,

Defendants.

CIVIL NO. 08-CV-0051

**CUC'S REPLY TO UNITED STATES'
RESPONSE TO MOTION TO
CONSTRUE AND CLARIFY ORDER**

Judge: David O. Carter

Date: (TBD)

Time:

Location:

REPLY

COMES NOW, the Commonwealth Utilities Corporation ("CUC") and
replies to the *United States' Response to CUC's Motion to Construe and Clarify
Order* (Dkt. no. 168) as further set forth herein.

**A. The United States' Response Shows that there is a
Significant Difference of Opinion on How the Order is to be**

**Interpreted. This Supports the Need for the Court's
Intervention to Construe and Clarify the Order**

The Response of the United States to CUC's Motion provides ample proof of the need for the Court to intervene to construe and clarify the EEMC Order of September 26, 2014 (Docket no. 151). EPA states that the EEMC Order provides EPA a substantial role in selecting the projects that will be implemented by the EEMC. (Declaration of Michelle Rogow, ¶11; Docket no. 168-2 at pg. 5 of 20.)

The conduct of "selecting" the projects that will be implemented by the EEMC is drastically different than the conduct of "prioritizing" the projects that will be implemented by the EEMC. Simply put, there is no provision in the EEMC Order which clearly states that EPA has the ability to unilaterally select which SO₂ projects the EEMC will implement and manage. On the other hand, the EEMC Order clearly provides that the EEMC "shall have authority for the complete management of SO₂, including but not limited to the performance of existing or future contracts and projects. (EEMC Order ¶B.5.(a).)

The United States sets forth various paragraphs of the EEMC Order as support for the position that EPA has the ability to select the projects which will be implemented by the EEMC with further oversight on how the work is to be implemented by the EEMC. The paragraphs cited are B1, B2, B6 and D1(f). (See, Response at ¶II.A.3., pg. 5.) However, a close look at the language

1 contained in these paragraphs indicates that the language should be
2 interpreted otherwise.

3 ¶B1 provides that the EEMC shall implement SO2 subject only to EPA's
4 prioritizing of the SO2 projects. This paragraph does not allow EPA to pick and
5 choose which of the SO2 projects are to be implemented and managed by the
6 EEMC. Similarly, ¶¶ B2 and B6 do not state that EPA has the authority, ability
7 or responsibility to determine what SO2 projects CUC will implement or
8 manage in lieu of the EEMC. ¶B6 does not give EPA the authority to direct
9 implementation or management of a particular SO2 project away from the
10 EEMC and over to CUC. Instead, this provision merely allows EPA to assume
11 responsibility for performance of some of the work that would otherwise be
12 performed by the EEMC. ¶D1(f) supports CUC's position that it is the EEMC
13 that will implement an SO2 project and that EPA's involvement is only to
14 approve the scope of work and the cost estimate for the project. EPA does not
15 have the ability under this paragraph to unilaterally determine whether a
16 project is to be implemented or managed by CUC instead of the EEMC.
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21 **B. The Speculative Nature of Remuneration Fund Deposits and**
22 **Project Costs is not a Reason to Allow EPA to Unilaterally**
23 **Shift the Burden of Implementation and Management of a**
24 **Project from the EEMC to CUC.**

25 It appears that the underlying theme of the Response of the United
26 States is that the speculative nature of funding the Remuneration Fund and
27 the costs of the various SO2 projects requires the EEMC Order to be
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1 interpreted to mean that EPA is able to unilaterally assign certain SO₂ projects
2 to the EEMC for implementation and management. (See generally, Response,
3 Docket no. 168, at pgs. 8-10 of 13.) However, this is not reason for EPA to
4 remove from the EEMC the responsibility to implement and manage all SO₂
5 contracts and projects, existing or future. The EEMC Order clearly provides
6 that any party, or the EEMC, at any time, may apply to the Court for
7 instructions and/or modification of the Order, “and may seek instructions as to
8 whether funds should be expended for a particular purpose”. EEMC Order
9 ¶C2.
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12 Simply put, under ¶C2 and G2, the EEMC or EPA can apply to the
13 Court for further instructions on the implementation and/or management of
14 certain SO₂ projects if it appears that funding for the projects becomes an
15 issue. This includes the ability to apply for a modification of the EEMC Order
16 taking the responsibility for implementation and/or management of the
17 project(s) away from the EEMC and shifting that burden back to CUC. CUC
18 submits that the difference of opinion on this issue is reason enough for CUC’s
19 Motion to be granted thereby invoking the Court’s jurisdiction to construe and
20 clarify what the responsibilities of the EEMC would be if project funding is
21 exhausted. For the EPA to conclude that the speculative and uncertain nature
22 of EEMC funding and projects costs means that, under the EEMC Order, it has
23 the sole ability to determine and dictate to the EEMC which SO₂ projects are to
24 be implemented or managed by the EEMC and which projects are to be
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1 implemented, managed and paid for by CUC, is improper without further
2 instructive guidance from the Court.

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4 **C. EEMC's has the Authority to Assume CUC's Contracts.**

5 The United States agrees that the EEMC has the authority to assume
6 CUC's contracts if the EEMC and the contractors agree. (Response, Docket no.
7 168 at pg. 12 of 13.) This statement should also be taken, then, for the position
8 that EPA is not the entity which has the ability to unilaterally decide which
9 existing contract or project the EEMC should assume. As the United States
10 points out, the assignment of an existing contract to the EEMC should be the
11 result of discussions between CUC, the contractor, and the EEMC. In fact, CUC
12 does not object to the involvement of EPA in these discussions. What CUC
13 objects to is EPA's interpretation of the EEMC Order to mean that it can
14 unilaterally select which SO2 projects will be implemented by the EEMC. There
15 is no provision in the EEMC Order which grants to EPA the power or authority
16 to unilaterally make this decision.
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20 **D. CONCLUSION**

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22 There is now a clear difference of opinion between EPA and CUC on how
23 the EEMC Order is to be interpreted. The Court has continuing jurisdiction to
24 "construe" the EEMC Order (EEMC Order, ¶¶ C2 and G2). It is crucial that all
25 parties, and the selected EEMC, understand the scope of the EEMC's duties
26 and responsibilities prior to the EEMC performing services pursuant to the
27 Order. If these responsibilities are not clarified, and if the relevant provisions of
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1 the Order are not construed prior to the appointment of an EEMC, it is highly
2 likely that the EEMC will have a third opinion of what its implementation and
3 management responsibilities are.

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5 The Response of the United States, that the motion should simply be
6 denied without any action on the part of the Court to construe or clarify this
7 important aspect of the Order, ignores completely the fact that there is a
8 substantial difference of opinion on how the EEMC Order is to be interpreted. A
9 denial of the Motion will surely lead to further conflict between EPA and CUC
10 over the role of EPA under the EEMC Order after an EEMC is appointed. It will
11 also lead to uncertainty within CUC with respect to future financial planning
12 and rate making. If CUC does not know in advance what SO₂ projects it may
13 be called upon to implement and manage, and be required to pay for out of its
14 operation funds, it cannot forecast expenditures for financial planning.
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16 Further, if CUC is required to spontaneously take on the responsibility to
17 implement, manage and fund SO₂ projects which have not been financially
18 planned for at the sole discretion of EPA, this could have an impact on the
19 solvency of CUC as well as its ability to comply with all SO₁ and SO₂ Orders.
20 CUC's sole source of guaranteed revenue to pay for these projects is rate
21 revenue.
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24 If the motion is granted, and the Court sets a hearing where the issue of
25 the EEMC's role in implementing and managing existing and future contracts
26 and projects can be discussed and resolved, the process will be beneficial to the
27 Court, the parties and the EEMC. CUC submits that it is for this very reason
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1 that ¶¶ C2 and G2 are set forth in the EEMC Order. These provisions are in
2 place as a mechanism to fix problems, not to prolong them.

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4 The fact that the language of these two provisions allows “any party, at
5 any time,” to apply to the Court implies, by its plain meaning, that these
6 provisions should be liberally construed to allow any party to invoke the
7 Court’s jurisdiction for the purpose of clarifying and construing and
8 interpreting portions of the Court’s EEMC Order when there is a clear
9 substantial difference of opinion between the parties over how relevant
10 provisions of the Order are to be interpreted.
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12 Respectfully submitted this 15th day of December, 2014.

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14 /s/ James S. Sirok
15 James S. Sirok
16 Legal Counsel, CUC
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